(1)

91-194

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of North Dakota

PETITION FOR WRIT OF CERTIORARI

Of Counsel

OLIVER OLDMAN
Professor of Law
Harvard University
Langdell Hall
Cambridge, MA 02138

JOHN E. GAGGINI
Counsel of Record

DON S. HARNACK
RICHARD A. HANSON
JAMES H. PETERS
NANCY T. OWENS
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, IL 60606
(312) 372-2000

WILLIAM P. PEARCE
PEARCE & DURICK
314 East Thayer Avenue
Bismarck, ND 58502
(701) 223-2890

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

Whether the North Dakota Supreme Court is obligated to follow the longstanding precedent of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), in a case that is factually indistinguishable from *Bellas Hess*?

Whether the North Dakota Supreme Court may give retroactive effect to its decision, which is contrary to established constitutional precedent, to make Quill liable for uncollected use taxes back to July 1, 1987?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution and Statutes:

Federal Bills and Hearings:

Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of North Dakota

PETITION FOR WRIT OF CERTIORARI

Petitioner, Quill Corporation ("Quill"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of North Dakota entered on May 7, 1991. The North Dakota Supreme Court decided a constitutional question contrary to this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

OPINIONS BELOW

The opinion of the Supreme Court of the State of North Dakota is reported at 470 N.W.2d 203 (1991), and is reprinted in the Appendix at A1-A36.

The Memorandum Opinion of Judge Graff of the District Court for the South Central Judicial District, County of

Burleigh, State of North Dakota, was issued on May 15, 1990 (N. Dakota State Tax Reporter (CCH) ¶ 200-376) and is reprinted in the Appendix at A38-A42.

JURISDICTION

This action was brought by the State of North Dakota ("North Dakota") against Quill for taxes alleged to be due under the North Dakota Use Tax Act, as amended (Sections 57-40.2-01(6) and (7), N.D. Cent. Code (Supp. 1989), and regulations promulgated thereunder (N.D. Admin. Code § 81-04.1-01-03.1 (1987)).

The Supreme Court of North Dakota entered its judgment on May 7, 1991. No rehearing was requested. This Petition is filed within 90 days of the North Dakota Supreme Court's judgment as allowed by 28 U.S.C. § 2101(c) and U.S. Supreme Court Rule 13.1.

The jurisdiction of this Court to review the judgment of the Supreme Court of the State of North Dakota is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

U.S. Const. art. I, § 8, cl. 3
U.S. Const. art. VI, ¶¶ 2 and 3
U.S. Const. amend. XIV, § 1
N.D. Cent. Code §§ 57-40.2-01(6) and (7) (Supp. 1989)
N.D. Admin. Code § 81-04.1-01-03.1 (1987)

The text of these provisions and related sections of the North Dakota Sales and Use Tax Acts are reproduced in the Appendix at A46-A57.

STATEMENT OF THE CASE

This case involves North Dakota's challenge to this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). In derogation of that decision, North Dakota has required Quill to collect and remit North Dakota use taxes on sales made by mail and telephone to North Dakota customers, despite Quill's lack of any physical presence or activities in North Dakota. The court imposed this tax liability retroactively to July 1, 1987.

Quill's Business.

Quill, a national mail order concern selling office supplies, stationery and office equipment, is incorporated in Delaware and maintains its principal place of business in Lincolnshire, Illinois.[1] Quill's only offices and warehouses are located in Illinois, California and Georgia and Quill is authorized to transact business only in those states.

Quill solicits sales through catalogs and advertising flyers mailed to customers throughout the United States, including customers located in North Dakota. All catalogs and advertising flyers are designed, printed and mailed from locations outside North Dakota. Quill receives orders from customers by mail and telephone (including fax, telecopy, telex and electronic mail[2]) at its Illinois, California and Georgia locations. Quill ships merchandise to fill those orders by United States mail or common carrier from locations outside North Dakota.

---

[1] Pursuant to Supreme Court Rule 29.1, the Court is advised that Quill is neither the parent nor the subsidiary of any other company.

[2] Electronic mail is a term to describe computer communication via telephone.

Quill does not own any real or personal tangible property whatsoever in North Dakota and does not maintain any office, distribution point, sales house, warehouse or other place of business in North Dakota. Quill does not have any agent, salesman, employee, representative, independent contractor, canvasser, solicitor or other person of any kind soliciting sales or otherwise acting on its behalf in North Dakota. Quill does not store inventory or merchandise in North Dakota and does not retain any security interest in merchandise sold to North Dakota customers. Quill does not have any telephone listing, toll-free telephone line, "800" number or WATS line in North Dakota. Quill does not have a bank account in North Dakota. Quill does not advertise by radio or television media in North Dakota, nor does it advertise in newspapers distributed in North Dakota or on billboards located in the state. Quill does not solicit by means of telegraphy, cable, optic, microwave, or similar communication system located in North Dakota.

The district court found that Quill's contacts with North Dakota were factually indistinguishable from the vendor's contacts with Illinois examined by this Court in *Bellas Hess*. App. A40.

The North Dakota Use Tax.

North Dakota levies a use tax upon the privilege of using in North Dakota "tangible personal property purchased at retail." N.D. Cent. Code § 57-40.2-02.1. The statute provides that the use tax is to be collected from the purchaser by any retailer "maintaining a place of business in this state" and is made the obligation of the retailer whether or not the tax is actually collected. N.D. Cent. Code § 57-40.2-07.

Prior to 1987, the terms "retailer" and "retailer maintaining a place of business in [North Dakota]" were applied in accordance with this Court's holding in *Bellas Hess*, requiring a "physical presence" in North Dakota such as an office, distribution house, sales house, warehouse, salesperson or agent. N.D. Cent. Code § 57-40.2-01(6) and (7) (prior to 1987 amendments).

In 1987, North Dakota enacted legislation to expand the term "maintaining a place of business" to include every person who engaged in the regular solicitation of sales of tangible personal property by the distribution of catalogs, periodicals, or advertising flyers by mail.[3] The effect of that legislation is to require mail order companies to collect North Dakota use tax even though their only contact with the state is through the U.S. mail, telephone and common carrier.[4]

---

[3] Section 57-40.2-01(6), N.D. Cent. Code (Supp. 1989) as amended in 1987, defines "retailer" to include:

> [E]very person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system. App. A47.

The definition of "[r]etailer maintaining a place of business in this state" was also amended to include substantially the same activities as defined above. N.D. Cent. Code § 57-40.2-01(7) (Supp. 1989) App. A47-A48.

[4] The North Dakota legislature recognized that the 1987 amendments to the North Dakota Use Tax Law when enacted conflicted with this Court's decision in *Bellas Hess*. *See* North Dakota House Concurrent Resolution ("H. Con. Res.") No. 3083 (which urged Congress to enact federal legislation to allow the states to impose sales and use tax obligations on out-of-state mail order vendors) App. A58-A59. *See also* 1987 House Committee Minutes regarding H. Con. Res. 3083, where State Rep. Hoffner, who introduced H. Con. Res. 3083, urged support for the Resolution by stating:

(Footnote continued on following page)

North Dakota's Administrative Code § 81-04.1-01-03.1 defines the term "regular or systematic solicitation" as three or more separate transmittances of any advertisement during a specified twelve-month period. App. A56. Quill falls within the definitions of a "retailer" and a "retailer maintaining a place of business in the state" under the amended North Dakota law because Quill solicits sales from the consumer market through catalogs and advertising flyers distributed by mail more than three times during the year, and would be required to collect North Dakota use tax from its residents under North Dakota law if that law is constitutional.

Proceedings Below.

North Dakota filed this action on July 7, 1989, asking to have Quill declared a retailer maintaining a place of business in North Dakota and to recover from Quill North Dakota use taxes (plus interest and penalties) levied upon North Dakota customers' local use of goods commencing

---

[4] *continued*

> The [North Dakota] house of representatives passed HB 1195 some weeks ago by a wide margin and that has a fiscal positive aspect on the state of about 14.1 million dollars. *The state can only realize that revenue if Congress passes this kind of [federal] legislation* (emphasis added). App. A60.

HB 1195 and SB 2555 amended N.D. Cent. Code § 57-40.2-01(6) and (7), which is the subject matter of this petition.

See also Testimony Before the House Finance and Taxation Committee (Jan. 13, 1987) where State Tax Commissioner M.K. Heidi Heitkamp stated:

> [T]his Bill [HB 1195] prepares the State for immediate implementation of any federal legislation. App. A66.

Federal legislation has been considered but has not yet been enacted by Congress. *See*, *infra*, p. 24, n.22.

July 1, 1987. Quill defended against North Dakota's action on the grounds that it violated the due process and commerce clauses of the U.S. Constitution as construed by this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). Quill also sought reimbursement of attorneys' fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988.

On cross-motions for summary judgment, the district court held for Quill based upon this Court's ruling in *Bellas Hess*:

> It seems clear to the Court that the case of *Hess v. Illinois*, 386 U.S. 753 (1967) prohibits this type of legislation. In *Hess*, the facts are very similar to those found in this case. Hess was a mail order house with its principal place of business in Missouri. Its sales to Illinois residents were substantial. Hess' manner of doing business in Illinois was similar to that of Quill in this case. (App. A40.)

* * * * *

Quill solicits sales of merchandise through catalogs and advertising flyers mailed to customers throughout North Dakota from locations outside of North Dakota. Quill does *not* maintain any office, distribution house, sales house, warehouse or any other place of business in North Dakota; it does *not* have any agent, salesmen, or other type of representative to sell or take orders, to deliver merchandise, to accept payments or to service merchandise it sells here; it does *not* have any telephone listing or toll free telephone line, and does *not* advertise by any radio or television media in North Dakota; it does *not* advertise in any newspapers distributed in North Dakota, nor solicit business in any fashion other than by catalog or flyer. *All of the business conducted in North Dakota is*

> *done by United States mail, telephone or common carrier.*[5] (App. A39.) (emphasis added).

The district court rejected the state's arguments that the constitutional standards set forth in *Bellas Hess* were no longer applicable, characterizing the state's arguments as "merely restatements" of Justice Fortas' dissent in *Bellas Hess*. App. A40. The court declared that the 1987 amendments to North Dakota Use Tax Law, Sections 57-40.2-01(6) and (7), violated the due process and commerce clauses of the United States Constitution and declared those amendments invalid as applied to Quill. App. A42. Without analysis, the court denied Quill's request for reimbursement of attorneys' fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988. App. A42.

The state appealed to the North Dakota Supreme Court which reversed.[6] The supreme court rejected the constitutional standards established in *Bellas Hess* and held that those principles were "obsolescent precedent" (App. A10) and no longer applicable to mail order sellers who did no more than communicate with customers by mail as part of a general interstate business. (*Quill*, App. A13, 25-26). The court, without any evidential support in the record, asserted:

> The economic, social, and commercial landscape upon which *Bellas Hess* was premised no longer exists,

[5] The district court rejected the state's argument that the QSL software programs (retail value $15 each) which were sold or transferred free of charge by Quill to six North Dakota customers constituted a sufficient basis to distinguish Quill from National Bellas Hess.

[6] Quill cross-appealed that portion of the final judgment whereby the district court dismissed Quill's counterclaim for reimbursement of attorneys' fees and other costs under 42 U.S.C. §§ 1983 and 1988.

> save perhaps in the fertile imaginations of attorneys representing mail order interests.

Quill, App. A11.

Although the North Dakota Supreme Court acknowledged that the 1987 amendments to the North Dakota statute were inconsistent with the " 'bright line' distinction between mail order sellers whose only connection with [their] customers in the taxing state was by common carrier or the United States mail and those with more significant connections [e.g., retail outlets, solicitors, or property] with the state," the court refused to follow the nexus test set forth in *Bellas Hess*. *Quill*, App. A6, *paraphrasing Bellas Hess*, 386 U.S. at 758. Instead, the court adopted the "economic benefits" test articulated by Justice Fortas (dissenting) in *Bellas Hess* as the appropriate standard to determine tax nexus and speculated that this Court would do the same. *Quill*, App. A13. The North Dakota Supreme Court held Quill liable for North Dakota use taxes on sales made by Quill into North Dakota commencing July 1, 1987. This petition followed.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE NORTH DAKOTA SUPREME COURT'S REFUSAL TO APPLY *BELLAS HESS* IN A CASE THAT IS FACTUALLY INDISTINGUISHABLE.

Bellas Hess.

This case directly presents the question whether this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), is still valid precedent and applicable to a case that is factually indistinguishable.

The Supreme Court of North Dakota rested jurisdiction to tax Quill upon its determination that "the foundational basis of *Bellas Hess* had been eroded and that [this Court will] so conclude." *Quill*, App. A13. The North Dakota Supreme Court cited no decision of this Court questioning the continued validity of *Bellas Hess*. Instead, the court adopted as the basis for its opinion Justice Fortas' dissent, buttressed by what it perceived as "tremendous social, economic, commercial and legal innovations since 1967," and concluded that the dissent accurately "forecast" the "diminishment" in value of *Bellas Hess* as precedent. *Quill*, App. A8, A10.

In *Bellas Hess*, Illinois attempted to require use tax collection by an out-of-state vendor whose contacts with Illinois consisted of regularly mailing catalogs and advertising flyers to Illinois residents and regularly delivering ordered goods via mail or common carrier. 386 U.S. at 754-55. Although National Bellas Hess did not own any tangible property, real or personal, in Illinois, it had sizeable mail order operations (approximately $60 million in total annual sales) and conducted a significant level of sales and advertising in Illinois.[7]

[7] National Bellas Hess made net sales of approximately $2.1 million into Illinois over a 15-month period, mailed semi-annual catalogs listing over 4,000 products to over 5 million customers, and sent advertising flyers to an even larger list of customers. *Bellas Hess*, 386 U.S. at 761. (Fortas, J., dissenting.) National Bellas Hess sold a substantial part of its merchandise on credit payment plans, accepted checks drawn on Illinois banks, and sold goods C.O.D. *Id.* The company provided merchandise guarantees to its customers, allowing returns, exchanges or refunds. It solicited names of potential new customers from existing customers and accepted orders by telephone. *Bellas Hess*, 386 U.S. at 761 n.2. *See* National Bellas Hess 1967 Catalog, Spring and Summer ed., *Bellas Hess*, Record on Appeal (O.T. 1966, No. 241).

This Court held that because the vendor's only contacts with the state were by mail and common carrier, Illinois' requirement that National Bellas Hess collect use tax on mail order sales made to Illinois residents violated both the due process clause of the fourteenth amendment and the commerce clause.[8] In reaching this result, this Court applied a long established tax nexus test that focused on whether the vendor maintained a physical presence (retail outlets, solicitors or property) within the taxing state. The Court reviewed approximately 30 years of jurisprudence and held:

> But the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail.

386 U.S. at 758.

This Court also recognized that to permit Illinois to impose use tax collection and payment obligations on a vendor who did not maintain an in-state physical presence would create "unjustifiable local entanglements" of interstate commerce. *Bellas Hess*, 386 U.S. at 760. "The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements, could entangle National [Bellas Hess'] interstate business in a

[8] Tax nexus criteria under the due process and commerce clauses are similar. *Bellas Hess*, 386 U.S. at 756; *Trinova Corp. v. Mich. Dept. of Treasury*, 111 S. Ct. 818, 828-29 (1991). Due process requires that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," *Bellas Hess*, 386 U.S. at 756, and the commerce clause requires that the tax "[be] applied to an activity with a substantial nexus with the taxing State, . . . not discriminate against interstate commerce, and [be] fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

virtual welter of complicated obligations to local jurisdictions." *Bellas Hess*, 386 U.S. at 759-60.

Mr. Justice Fortas dissented, positing that "economic benefits" derived from a state should create tax nexus. *Bellas Hess*, 386 U.S. at 761 (Fortas, J., dissenting). The North Dakota Supreme Court candidly rejected the majority opinion and adopted the "economic benefits" test expressed by Justice Fortas as law to establish tax jurisdiction over Quill. It is this departure from established precedent by the court below that forces Quill to petition this Court for writ of certiorari.

This Court Has Consistently Applied *Bellas Hess*.

In *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), Justice Clark reviewed this Court's prior decisions regarding unconstitutional state taxes. While conceding that those decisions were sometimes confusing and inconsistent he stated: "From the quagmire there emerge, however, some firm peaks of decision which remain unquestioned." 358 U.S. at 458. For the last quarter century, this Court's decision in *Bellas Hess* has been one of those "firm peaks of decision".[9]

This Court has consistently applied *Bellas Hess* and has never held that communicating with customers by mail or telephone is sufficient to provide tax nexus. The continuing validity of *Bellas Hess* was recognized by this Court as recently as *Goldberg v. Sweet*, 488 U.S. 252 (1989). Therein, this Court was called upon to decide whether an Illinois tax on interstate telecommunications violated

[9] *Bellas Hess* has been cited by this Court and by lower state and federal courts in approximately 75 cases decided over the last quarter-century. *See* App. A76-A81.

the commerce clause. In deciding that issue, this Court cited *Bellas Hess* as relevant authority and expressed doubts "that termination of an interstate telephone call, by itself" provided sufficient nexus for a state to tax that telephone call.[10] *Goldberg v. Sweet*, 488 U.S. at 263. This strong statement by this Court in *Goldberg* is consistent with the holding in *Bellas Hess* that vendors who "do no more than communicate with customers" in the taxing state are constitutionally protected from use tax collection duties. *Bellas Hess*, 386 U.S. at 758.

In 1988 this Court implicitly reaffirmed its *Bellas Hess* holding in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988). In *D.H. Holmes*, the Court addressed an attempt by Louisiana to impose use tax liability on D.H. Holmes, a Louisiana retailer, for catalogs it had printed out of state and shipped to Louisiana. D.H. Holmes maintained its principal place of business in New Orleans, operated 13 stores there and employed approximately 5,000 workers in Louisiana. 486 U.S. at 26-27. D.H. Holmes argued that it should be treated like the mail order company in *Bellas Hess*, "apparently view[ing] its catalog distribution as analogous to the mail order solicitation in *National Bellas Hess*." *D.H. Holmes*, 486 U.S. at 33. Chief Justice Rehnquist, in a unanimous decision, restated with approval this Court's holding in *Bellas Hess* and distinguished D.H. Holmes on the ground that the retailer was clearly physically present in Louisiana.

Contrary to the North Dakota Supreme Court's suggestion (*Quill*, App. A15), this Court did not abandon the

[10] All parties in *Goldberg v. Sweet* conceded that the "substantial nexus" test of *Complete Auto* had been satisfied because each party owned property located in Illinois. 488 U.S. at 256 n.6, 258 n.9, 260.

nexus standard set forth in *Bellas Hess* when deciding *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977). In *National Geographic*, the vendor maintained two offices and up to eight employees in California to solicit advertising for its magazine. *National Geographic*, 430 at 552, 555-56; 547 P.2d 458, 459 (Cal. 1976). National Geographic also operated a mail order business from its facilities located in the District of Columbia and Maryland. California sought to require National Geographic to collect use tax from mail order sales of merchandise to California residents. The California Supreme Court agreed and stated:

> Where an out-of-state seller conducts a substantial mail order business with residents of a state . . . the *slightest presence* within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose on the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so.

National Geographic, 430 U.S. at 555-56 quoting *National Geographic*, 547 P.2d 458, 462 (Cal. 1976) (emphasis added by the Court).

While upholding California's claim, this Court specifically rejected California's "slightest presence" test, stating:

> [N]ot every out-of-state seller may constitutionally be made liable for payment of the use tax on merchandise sold to purchasers in the [taxing] State.

430 U.S. 551, 555 (1976).

This Court focused on the physical presence of National Geographic in California, not the "economic benefits" derived from the state or the "slightest presence" theory advanced by the California court. *National Geographic*,

430 U.S. at 556. This is demonstrated by the Court's reiteration in *National Geographic* of the holding in *Bellas Hess*:

> The Court's opinion [in *Bellas Hess*] carefully underscored, however, the 'sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State and those [like National Bellas Hess] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. *Id.* at 758. *Appellant [National Geographic] Society clearly falls into the former category.*

National Geographic, 430 U.S. at 559 (emphasis added).

This Court's decision in *National Geographic* is consistent with *Bellas Hess*.

The North Dakota Supreme Court's contention that *Bellas Hess* was eroded by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), is also wrong. That court correctly recognized that *Complete Auto* sets forth the relevant tests for analyzing whether a state's tax violates the commerce clause. The first prong of the *Complete Auto* test requires a finding of an "activity with a substantial nexus with the taxing State." *Complete Auto*, 430 U.S. at 279. However, far from abandoning *Bellas Hess*, this Court's later decisions make it abundantly clear that *Bellas Hess* is entirely consistent with *Complete Auto*. For example, in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), this Court noted that *Bellas Hess* is the touchstone of the first prong of *Complete Auto*:

> Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. See *National Bellas Hess, Inc. v. Illinois Revenue Dept.*, 386 U.S. 753 (1967).

Commonwealth Edison, 453 U.S. at 626 (emphasis in original). Thus, far from being rejected, the *Bellas Hess* decision was directly incorporated into the *Complete Auto* commerce clause test.[11]

The Standards for Personal Jurisdiction and Tax Nexus Differ.

The North Dakota Supreme Court's reliance on *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and other personal jurisdiction cases is misplaced. The North Dakota Supreme Court fails to note that this Court in *Bellas Hess* refused to adopt a tax standard fashioned from these personal jurisdiction cases. In *Bellas Hess*, the State of Illinois urged this Court to adopt the "economic benefits" test that had already been applied in the personal jurisdiction cases for at least ten years. Appellee's Brief at 32-34, *Bellas Hess* (O.T. 1966, No. 241). This Court declined to adopt that test to establish tax nexus and held in *Bellas Hess* that even continuous and systematic solicitation by mail would not create tax nexus as long as the taxpayer did not maintain a physical presence in the state. This Court has consistently distinguished between these two standards, tax nexus and personal juris-

[11] This Court's decisions in *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232 (1987), and *Standard Pressed Steel v. Washington Dept. of Revenue*, 419 U.S. 560 (1975), do not support the North Dakota Court's refusal to follow *Bellas Hess*. In both cases this Court focused on the substantial in-state activities of the taxpayers to uphold a finding of tax nexus. Standard Pressed Steel had one full-time employee and a group of other employees that regularly visited with the company's principal customer in Washington. 419 U.S. at 561. Tyler Pipe had independent sales representatives who acted daily on behalf of Tyler Pipe in calling on its customers and in soliciting orders in Washington. 483 U.S. at 232, 249.

diction. *See Travelers' Health Assoc. v. Virginia*, 339 U.S. 643, 653-54 (1950) (Douglas, J., concurring):

> It is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process.
>
> * * * * *
>
> The requirements of due process may demand more or less minimal contacts . . . depending on what the pinch of the decision is or what [a state] requires of the foreign corporation.

The North Dakota Supreme Court's analysis confuses the differing standards necessary to establish personal jurisdiction or tax nexus.

The North Dakota Supreme Court's Decision Violates The Doctrine Of Federal Supremacy.

The North Dakota Supreme Court attempts to justify its refusal to follow precedent by labeling it as obsolete, citing *North Dakota v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973). *Quill*, App. A10. In *Snyder*, the state court relied upon precedent which was abandoned earlier by the U.S. Supreme Court. Although this Court had not had the occasion to overrule *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928), it had clearly abandoned the case as authority. This Court was most moderate in its reversal of the North Dakota Supreme Court, although it legitimately could have questioned that court's failure to follow this Court's more recent decisions.

In this case the North Dakota court concludes that because of the "tremendous social, economic, commercial, and legal innovations since 1967" this Court's decision in

Bellas Hess is obsolete.[12] *Quill*, App. A10. Without regard to the efficacy of the North Dakota Supreme Court's analysis, that court does not have the prerogative of refusing to follow precedent of this Court.

When a question of federal law is submitted to a state court, it is the duty of that court "to administer the law prescribed by the Constitution . . . as construed by [the Supreme] Court." *South Carolina v. Bailey*, 289 U.S. 412, 420 (1933). "The determination by this Court of [a federal] question is binding upon state courts and must be followed, any state law, decision or rule to the contrary notwithstanding." *Chesapeake & Ohio Ry. v. Marlin*, 283 U.S. 209, 221 (1931).

In *Cooper v. Aaron*, 358 U.S. 1 (1958), this Court reiterated basic constitutional propositions which are settled doctrine, among which is that state courts must follow this Court's decisions. More recently in *Hutto v. Davis*, 454 U.S. 370, 375 (1982), this Court again stated "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judge of those courts may think it to be."

In the recent decision of *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989), this Court instructs that "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decision, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." 490 U.S. at 484. In *The Mayor v. Cooper*, 73 U.S. (6 Wall) 247, 253 (1867), this Court recognized that "[a] different principle would lead to the most mischievous consequences. The courts of the several States might determine the same questions in different ways. There would be no uniformity of decisions."

[12] The North Dakota Supreme Court ignored this Court's recent refusal to grant certiorari in *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn. 1990), *cert. denied* 111 S.Ct. 77 (1990), a case raising the same issue as *Quill*. On June 17, 1991, this Court also denied certiorari in *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991), *cert. denied sub nom. Commissioner of Revenue v. SFA Folio Collections, Inc.*, 59 U.S.L.W. 3838 (U.S. 1991), where the State of Connecticut urged this Court to reverse *Bellas Hess*.

This doctrine has equal application to the Supreme Court of North Dakota. That court makes no attempt to distinguish the facts in *Bellas Hess*. Rather it literally reverses *Bellas Hess*, calling this Court's decision obsolete. The North Dakota Supreme Court's decision is clearly "an indefensible brand of judicial activism," *Rodriguez*, 490 U.S. at 486 (Stevens, J., dissenting), and will result in much confusion if not reviewed by this Court.

The North Dakota court departs from the tax nexus standard consistently followed for approximately twenty-five years. The supreme courts of Connecticut and Pennsylvania have recently followed *Bellas Hess*, as has a federal district court in California.[13] If this Court does not review the North Dakota decision, out-of-state mail order

[13] *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991), *cert. denied sub nom. Commissioner of Revenue v. SFA Folio Collections, Inc.*, 59 U.S.L.W. 3838 (U.S. 1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn. 1990), *cert. denied*, 111 S. Ct. 77 (1990); *Bloomingdale's By Mail, Ltd. v. Commonwealth of Pennsylvania*, 567 A.2d 773 (Pa. Commw. Ct. 1989) *aff'd per curiam*, 591 A.2d 1047 (Pa. 1991); *Direct Marketing Association, Inc. v. Bennett*, No. Civ. S-88-1067 (E.D. Cal., June 28, 1991) (transcript of the court's decision and order for summary judgment are reproduced at App. A67-A75).

vendors are left with conflicting standards that eliminate any marked degree of certainty applicable to interstate commerce and due process concerns.[14] If allowed to stand without review, the North Dakota decision will proliferate confusion in sales and use tax administrative practices and judicial review of those practices in other states.[15] If applied on a national basis, the North Dakota ruling would

[14] One commentator observes:

> Sound policy reasons support the Court's view that economic presence alone does not create the required nexus. Standards using communicative and incidental contacts do not achieve any marked degree of certainty, one goal of due process. With respect to the commerce clause, compliance with over 6,500 taxing jurisdictions is simply too burdensome for the majority of the mail order industry's members: small mail order vendors. On their own initiative, states have legislated away these federal constitutional safeguards.

White, *State Use Tax Collection*, 42 Fla. L.R. 775, 801 (1990).

[15] *Compare Direct Marketing Association, Inc. v. Bennett*, No. Civ. S-88-1067 (E.D. Ca. 1991) App. A67; *Aldens, Inc. v. Miller*, 466 F. Supp. 379 (S.D. Iowa 1979) *aff'd*, 610 F.2d 538 (8th Cir.), *cert. denied*, 446 U.S. 919 (1980); *Sturbridge Yankee Workshop, Inc. v. State Board of Equalization*, No. 512584 (Sacramento Superior Court, Cal. January 29, 1991); *Land's End, Inc. v. California State Board of Equalization*, No. 620135 (San Diego Superior Court, Cal. 1991); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991), *cert. denied sub nom. Commissioner of Revenue v. SFA Folio Collections, Inc.*, 59 U.S.L.W. 3838 (U.S. 1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn. 1990), *cert. denied*, 111 S.Ct. 77 (1990); *Burke & Sons Oil Co. v. Director of Revenue*, 757 S.W.2d 278 (Mo. App. 1988); *Book-of-the-Month Club, Inc. v. Porterfield*, 268 N.E. 2d 272 (Ohio 1971); *Bloomingdale's By Mail, Ltd. v. Commonwealth of Pennsylvania*, 567 A.2d 773 (Pa. Commw. Ct. 1989), *aff'd per curiam*, 591 A.2d 1047 (Pa. 1991); *L.L. Bean, Inc. v. Commonwealth of Pennsylvania*, 516 A.2d 820 (Pa. Commw. Ct. 1986); *with SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Davidson County Chancery Ct. Tenn. March 11, 1991); *Bloomingdale's By Mail, Ltd. v. Huddleston*, No. 89-3017-II (Davidson County Chancery Ct. Tenn. March 8, 1991).

subject all out-of-state mail order vendors to the multiple burdens of collecting and paying use taxes according to the laws of each state and local subdivision to which they ship merchandise, solely by reason of their use of the United States mail to send catalogs into those jurisdictions.[16] *Bellas Hess*, 386 U.S. at 759 n.12.

This impediment on interstate business is "neither imaginary nor remote." *Bellas Hess*, 386 U.S. at 759. Out-of-state mail order vendors would be compelled to stop using

[16] The compliance problems associated with the variances in the laws of state and local taxing jurisdictions are extensive. *See State Taxation of Interstate Commerce: Hearing on S.1510 before the Subcomm. on Taxation and Debt Mgmt. of the Senate Committee on Finance*, 99th Cong., 1st Sess. 80-82 (1985) ["Hearing on S.1510"] (testimony of Alan Glazer on behalf of the Direct Marketing Ass'n); *Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891 and H.R. 3521*, before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 100th Cong, 2nd Sess. 129-130 (1988) ["Hearings on H.R. 1242, H.R. 1891 and H.R. 3521"] (testimony of Nat Standing of J.C. Penney Company stating that the administrative costs of compliance "are enormous"); Levering, *Federal Legislation*, 4 N.Y.U. Inst. on State and Local Taxation, ch. 8 at § 8.03 (1986).

Federal legislation proposed in the wake of *Bellas Hess* would have allowed collection of local use taxes *only* if uniform as to rate, base and administration by the state. *See* S.282, 93rd Cong., 1st Sess. (1973); S.2092, 93rd Cong., 1st Sess. (1973); and S.2173, 95th Cong., 1st Sess. (1977).

Current legislative proposals also seek uniformity and the elimination of the tremendous compliance burdens by establishing uniform rates, exemptions, collection allowances, filing requirements and audit procedures. *See, e.g.*, Committee on State Taxation of the Council of State Chambers of Commerce, *COST Endorses Compromise on Bellas Hess Legislation*, State Tax Report Nos. 253 at 1 (Sept. 26, 1990); 244 at 1 (Dec. 15, 1989). The reluctance of Congress to enact federal legislation without agreed uniformity among the state and local taxing units highlights the numerous compliance problems facing out-of-state mail order vendors.

the mails to send advertising and goods to customers unless these vendors are able to undertake the extraterritorial obligation of collecting taxes.[17] For a mail order firm whose advertising runs nationwide, compliance means acting as a tax collector for each of the states and local subdivisions that impose sales and use taxes, approximately 6500 jurisdictions.[18] The consequences of North Dakota's decision is to close interstate markets to out-of-state vendors unless they sustain the burden of acting as tax collectors for the uncoordinated sales and use tax systems of states and municipalities throughout the nation. *Bellas Hess*, 386 U.S. at 759.

---

[17] The complexities of complying with these various tax laws range from variations in rates of tax, allowable exemptions, and administrative and recordkeeping requirements. *Bellas Hess*, 386 U.S. at 759.

[18] When this Court considered *Bellas Hess*, it considered the burdens that would be caused by compliance with 2300 tax jurisdictions. *Bellas Hess*, 386 U.S. at 759 n.12. Professor Archibald Cox set forth before this Court in explicit detail the disproportionate burdens which would be placed on interstate commerce if state and local governments were able to impose use tax collection burdens on out-of-state vendors who conducted a general interstate business. Appellant's Brief, App. B at 55-69, *Bellas Hess* (O.T. 1966, No. 241).

The compliance obligations, based on the number of taxing jurisdictions, have increased almost threefold with the passage of time. Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales* at 6, 11 (April 1986) ["ACIR Report"]; Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L.J. 535, 539 (1991).

II.

THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE NORTH DAKOTA SUPREME COURT'S IMPROPER IMPOSITION OF LIABILITY RETROACTIVELY TO JULY 1, 1987.

If North Dakota and each of the states that has enacted "anti-*Bellas Hess*"[19] statutes can successfully impose tax liability, retroactive to the date of enactment of that legislation, the liabilities for uncollected use taxes may total billions of dollars.[20] That retroactive application, countenanced by the court below, would economically destroy a huge segment of the mail order industry.

The mail order industry has relied upon the *Bellas Hess* doctrine for a quarter-century. Lower courts, with the exception of North Dakota, have consistently applied the physical presence test expressed in *Bellas Hess* to determine tax nexus.[21] A retroactive abandonment of that stan-

---

[19] "Anti-*Bellas Hess*" legislation refers to legislation that makes advertising by catalog or otherwise a sufficient nexus for sales and use tax purposes.

[20] *See ACIR Report* at 3-6, 29-35; *Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearing on S.639 and S.1099 for the Subcomm. on Taxation and Debt Mgmt. of the Sen. Comm. on Finance*, 100th Cong., 1st Sess. 15-18 (1987) ["Hearing on S.639 and S.1099"] (testimony of North Dakota Governor Sinner estimating revenue loss); *Hearings on H.R. 1242, H.R. 1891 and H.R. 3521*, at 154-182 (statement of Warren G. Stambaugh on behalf of the National Conference of State Legislatures).

[21] Two Tennessee trial courts have also refused to apply *Bellas Hess*. One case (*Bloomingdale's By Mail, Ltd. v. Huddleston*, No. 89-3017-II (Davidson Cty. Chancery Ct., Tenn. March 8, 1991), *appeal docketed*, No. 01-S-01-9106-CH-00047) is on appeal to the Tennessee Supreme Court which just last year recognized the continued validity of *Bellas Hess* in *Pearle Health Services, Inc. v. Taylor*, 799 S.W.2d 655 (Tenn. 1990). The other trial court decision, *SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Davidson Cty. Chancery Ct., Tenn. March 11, 1991), has been placed on inactive status pending the appeal of *Bloomingdale's By Mail*.

dard as is mandated by the North Dakota decision will work economic havoc upon the industry and unfairly penalize those mail order vendors who have relied upon this Court's pronouncement. This result obtains because most mail order vendors do not have the ability to collect taxes on prior sales.[22] These vendors would thus be left with a direct tax liability. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 347 (1954); *Bellas Hess*, 386 U.S. at 757 n.9.

---

[22] *See Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 before the Subcomm. on Select Revenue Measures for the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 130-134 (1987) (testimony and prepared statement of Alan Glazer on behalf of the Direct Marketing Ass'n regarding difficulties arising from potential nonpayment of tax by purchasers), and at 152-153 (testimony of William T. End of L.L. Bean, Inc. discussing cost of post-sales collection efforts).

Congress has considered prospective legislation addressing use tax collection by mail order businesses. S.282, 93rd Cong., 1st Sess. (1973); S.2092, 93rd Cong., 1st Sess. (1973); S.2811, 93rd Cong., 1st Sess. (1973); S.2173, 95th Cong., 1st Sess. (1977); S.983, 96th Cong., 1st Sess. (1979); S.1510, 99th Cong., 1st Sess. (1985); H.R. 3549, 99th Cong., 1st Sess. (1985); S.639, 100th Cong., 1st Sess. (1987); S.1099, 100th Cong., 1st Sess. (1987); H.R. 1242, 100th Cong., 1st Sess. (1987); H.R. 3521, 100th Cong., 1st Sess. (1987); H.R. 1891, 100th Cong., 2nd Sess. (1987); S.2368, 100th Cong., 2nd Sess. (1988); S.480, 101st Cong., 1st Sess. (1989); and H.R. 2230, 101st Cong., 1st Sess. (1989).

One reason that federal legislation has not been enacted is the various state and local governments' inability to agree upon some method to facilitate collection of taxes at varying rates on different tax bases for the thousands of taxing jurisdictions that impose sales or use taxes. *See Hearings on H.R. 1242, H.R. 1891 and H.R. 3521* at 60-61 (exchange between Rep. Rodino and North Dakota Governor George Sinner regarding administrative and compliance problems associated with collecting taxes for multiple jurisdictions), at 362-364 (testimony of Cathy Reynolds, Councilwoman-at-Large, Denver, Colo., regarding the "long and arduous process" of a proposed state and local compromise), and at 391-392 (exchange between Rep. Fish and Ms. Reynolds indicating inability to agree upon legislative language).

CONCLUSION

The North Dakota ruling refuses to follow a controlling decision of this Court and is squarely opposed to other state supreme court decisions. The decision is inconsistent with the concept of a national market, which underlies both the commerce and due process clauses. If not reviewed by this Court, the North Dakota decision will proliferate confusion in state tax laws administered in other states not only for mail order businesses but also for all concerns that conduct a general interstate business where their only contact with the state is by interstate telephone, United States mail or common carrier.

This petition for a writ of certiorari to the Supreme Court of North Dakota should be granted.

Respectfully submitted,

Dated: August 1, 1991

Of Counsel

OLIVER OLDMAN
Professor of Law
Harvard University
Langdell Hall
Cambridge, MA 02138

JOHN E. GAGGINI
Counsel of Record

DON S. HARNACK
RICHARD A. HANSON
JAMES H. PETERS
NANCY T. OWENS
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, IL 60606
(312) 372-2000

WILLIAM P. PEARCE
PEARCE & DURICK
314 East Thayer Avenue
Bismarck, ND 58502
(701) 223-2890

Attorneys for Petitioner